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FIRST GENERAL COUNSEL'S REPORT

MURs: 6078, 6090, 6108, 6139, 6142, 6214
STATUTE OF LIMITATIONS: Earliest: January 2012
Latest: December 2013

MUR 6078 (Filed: September 16, 2008; Activated: December 8, 2008)

COMPLAINANT: James C. Fling

RESPONDENTS: Obama for America and Martin Nesbitt, as Treasurer

MUR 6090 (Filed: October 6, 2008; Activated: December 8, 2008)

COMPLAINANT: Republican National Committee

RESPONDENTS: Obama for America and Martin Nesbitt, as Treasurer

MUR 6108 (Filed: October 23, 2008; Activated: December 8, 2008)

COMPLAINANT: Bridget Kohtz

RESPONDENTS: Obama for America and Martin Nesbitt, as Treasurer

MUR 6139 (Filed: December 2, 2008; Activated: March 19, 2009)

COMPLAINANT: Mary E. Daniels

RESPONDENTS: Obama for America and Martin Nesbitt, as Treasurer, and
Obama Victory Fund and Andrew Tobias, as Treasurer

MUR 6142 (Filed: December 11, 2008; Supplemented: Multiple Dates; Activated: March 19, 2009)

COMPLAINANTS: Luanne Moore, Lia Thalmas, Karen Smith

RESPONDENTS: Obama for America and Martin Nesbitt, as Treasurer, and
Obama Victory Fund and Andrew Tobias, as Treasurer

MUR 6214 (Filed: September 15, 2009; Activated: November 10, 2009)

COMPLAINANTS: James R. Wilkins

RESPONDENTS: Obama for America and Martin Nesbitt, as Treasurer

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RELEVANT STATUTES:

- 2 U.S.C. § 437g
- 2 U.S.C. § 438(b)
- 2 U.S.C. § 441a(a)(1)
- 2 U.S.C. § 441a(f)
- 2 U.S.C. § 441e
- 2 U.S.C. § 441f
- 11 C.F.R. § 102.9
- 11 C.F.R. § 102.17
- 11 C.F.R. § 103.3
- 11 C.F.R. § 110.1(b)
- 11 C.F.R. § 110.20

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

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I. INTRODUCTION

These six matters involve similar and overlapping allegations that Obama for America and Martin Nesbitt, in his official capacity as Treasurer ("OFA" or the "Committee") - Barack Obama's principal campaign committee for the 2008 presidential election - accepted excessive and/or prohibited contributions in violation of the Federal Election Campaign Act of 1971, as amended, ("FECA" or "the Act"). Two of the matters, MURs 6139 and 6142, also involve related allegations as to the Obama Victory Fund and Andrew Tobias, in his official capacity as Treasurer ("OVF" or the "Victory Fund"), a joint fundraising committee formed by OFA and the Democratic National Committee. As discussed below, the allegations as to OFA's possible receipt of excessive contributions is co-extensive with bases for an ongoing audit of OFA that the Commission initiated in the ordinary course of its supervisory responsibilities.

The complaints vary in their approach to presenting allegations as to possible widespread patterns of illegal contributions. While some of the complaints rely primarily on media reports regarding anecdotal examples of allegedly suspicious online fundraising transactions, *see* MURs 6078/6090/6108, other complaints provide a listing of specific transactions that are alleged to be part of suspicious patterns. *See* MURs 6139, 6142, 6214. The complaints specifically request that the Commission audit OFA and OVF to determine the extent of the alleged violations.

Rather than attempting to address all of the transactions being questioned, OFA and OVF focus on their comprehensive compliance system, and assert that this system allowed them to identify and take appropriate corrective action as to all contributions for which there were genuine questions as to possible illegality. *See* OFA Responses in MURs 6078/6090/6108, MURs 6139 & 6142 and MUR 6214, and OVF Responses in MURs 6139 & 6142. Respondents assert that all genuinely excessive and prohibited contributions detailed in the complaints have

1 been refunded. Respondents also contend that Complainants' allegations are highly speculative,
2 lack the specificity needed to demonstrate a violation of the Act, and that the patterns identified
3 by Complainants do not support any inference of illegality. *Id.*

4 During the 2007-2008 election cycle, the Commission's Reports Analysis Division
5 ("RAD") sent the Committee multiple Requests for Additional Information ("RFAs") regarding
6 apparent excessive contributions of the same general types as those identified in the complaints.
7 While the Committee was responsive to issues raised in the RFAs, RAD's review of Committee
8 disclosure reports suggests that OFA has accepted, and failed to take timely corrective action
9 with regard to excessive contributions, which may total between \$1.89 million and \$3.5 million,
10 an amount that is quite large in terms of prior excessive contribution cases, but constitutes less
11 than 1% of the \$745 million in total contributions received by OFA. *See* Chart A, *infra*. On
12 March 16, 2009, pursuant to its Review and Referral Procedures, RAD referred the Committee to
13 the Audit Division for a 2 U.S.C. § 438(b) audit.

14 On April 16, 2009, the Commission approved the Section 438(b) audit of the Committee.
15 The Commission's Audit Division has obtained financial database information from OFA, and
16 undertaken reconciliation of bank statements with disclosure reports. The Audit Division
17 commenced field work in December 2009, which is currently ongoing. The focus of the Section
18 438(b) audit is to examine whether the Committee was in material compliance with the
19 regulations and requirements of the Act and whether its procedures for identifying potential
20 violations was appropriate, as specified in the 2007-2008 Authorized Audit Program. The audit
21 will include a review and testing of the Committee's compliance procedures, vetting and
22 reporting processes regarding excessive contributions.

1 These matters present the Commission with the question of whether the primary
2 consideration should be the seemingly large actual dollar amount of the apparent violation
3 (between \$1.89 million and \$3.5 million) or seemingly small level of noncompliance reflected by
4 the percentage relationship between the violation and OFA's overall receipts (less than 1/2 of 1%).
5 For the reasons discussed below, we recommend that the Commission find reason to believe that
6 Obama for America and Martin Nesbitt, in his official capacity as Treasurer, violated 2 U.S.C.
7 § 441a(f), and authorize a Section 437g audit to be performed concurrently with the ongoing
8 Section 438 audit.

9 In contrast to the substantial support for allegations relating to excessive contributions,
10 the allegations that OFA accepted prohibited contributions from foreign nationals (in violation of
11 Section 441e) and from fictitious names (in violation of Section 441f) are either wholly
12 speculative or appear to involve sums that are *de minimis* both in terms of dollar amount and as a
13 percentage of OFA's overall receipts. Accordingly, for the reasons explained in more detail
14 below, we are recommending that the Commission dismiss allegations that Obama for America
15 and Martin Nesbitt, in his official capacity as Treasurer, violated 2 U.S.C. §§ 441e and 441f.

16 There are no indications that the Victory Fund accepted excessive contributions or
17 contributions from foreign nationals, or misreported disbursements to OFA. Accordingly, we
18 recommend the Commission find no reason to believe that Obama Victory Fund and Andrew
19 Tobias, in his official capacity as Treasurer violated 2 U.S.C. §§ 441a(f), 441e or 434(b).
20 Although the Obama Victory Fund and Andrew Tobias, in his official capacity as Treasurer, may
21 have accepted contributions from an unknown donor, we recommend that the Commission
22 dismiss this potential violation of 2 U.S.C. § 441f because the amount at issue does not warrant
23 further Commission resources.

1 **II. FACTUAL AND LEGAL ANALYSIS**

2 The primary issue in these matters is whether Respondents accepted impermissible
3 contributions through their online fundraising efforts. Although the Commission has not
4 mandated specific procedures to verify the identity of an individual making a credit card
5 contribution over the Internet, it has opined that a committee which intends to solicit and receive
6 credit card contributions over the Internet must be able to verify the identity of those who
7 contribute via credit card with the same degree of confidence that is generally provided when a
8 committee accepts a check via direct mail.¹ Advisory Opinion 2007-30 (Chris Dodd for
9 President, Inc.); *see also* Explanation and Justification for Matching Credit Card and Debit Card
10 Contributions, 64 Fed. Reg. 32394, 32395 (June 17, 1999); Advisory Opinion 1999-09 (Bill
11 Bradley for President, Inc.); Advisory Opinion 1995-09 (NewtWatch PAC); *see also*
12 Commission Guideline for Presentation in Good Order (guidance to presidential campaigns
13 seeking federal matching funds, presented by the Audit Division and approved by the
14 Commission in July 2007). In sum, a committee is charged with the same responsibility to "allay
15 concerns over the receipt of prohibited contributions" regarding its online contributions as its
16 contributions solicited and received through any other method. *Id.* (quoting Matching Credit
17 Card and Debit Card Contributions, 64 Fed. Reg. at 32395).

¹ Advisory Opinions have looked favorably upon several methods for notifying contributors of a committee's legal obligations as well as verifying contributors' identities, including: using web page solicitation forms that post clear and conspicuous language informing prospective donors of the Act's source restrictions and contribution limits, requiring a donor to complete and submit for processing a contribution form that includes the contributor's name, contributor's name as it appears on a credit card, billing address associated with the card number, expiration date of the card, contributor's residential address and amount of contribution. *See, e.g.*, AO 2007-30 at 3. The committee should also include procedures that will allow it to screen for contributions made using corporate or business entity credit cards, until a process whereby the donor must attest: (1) the contribution is made from his own funds and not those of another; (2) contributions are not made from general treasury funds of a corporation, labor organization or national bank; (3) donor is not a federal government contractor or a foreign national, but is a citizen or permanent resident of the United States; and (4) the contribution is made on a personal credit card for which the donor, not a corporation or business entity, is legally obligated to pay. *Id.* at 2-4.

1 As a safeguard against receiving prohibited contributions, the Act's regulations hold the
2 committee's treasurer "responsible for examining all contributions received for evidence of
3 illegality." 11 C.F.R. § 103.3(b). While contributions that may "present genuine questions" as
4 to whether they were made by foreign nationals or other prohibited parties may initially be
5 deposited into a campaign's depository, the treasurer is charged with making his or her "best
6 efforts to determine the legality of the contributions." 11 C.F.R. § 103.3(b)(1). If the
7 contribution cannot be determined to be legal, or is discovered to be illegal even though it "did
8 not appear to be illegal" at the time it was received, the treasurer must refund the contribution
9 within thirty (30) days of the date of said discovery. 11 C.F.R. § 103.3(b)(2). By contrast, if the
10 committee determines that a contribution exceeds the contribution limitations enumerated in
11 2 U.S.C. § 441a(a)(1), the treasurer has sixty (60) days to refund the excessive contribution, or
12 obtain a written redesignation or reattribution of the excessive portion. 11 C.F.R.
13 § 110.1(b)(3)(i).

14 **A. Background**

15 **1. Obama for America**

16 Obama for America is the principal campaign committee for President Barack Obama.
17 During the 2008 election cycle, OFA, as an authorized candidate committee, was limited to
18 contributions from individual donors who in the aggregate did not exceed \$2,300 each for the
19 primary and general elections. 2 U.S.C. § 441a(a)(1)(A). Since filing its Statement of
20 Organization on January 16, 2007, the Committee raised over \$745 million from over 3.9 million
21 contributors, approximately \$450 million of which was received in online contributions through
22 the campaign's website. OFA Response in MURs 6078/6090/6108 at 1-2.

1 Respondents explain that, to handle the unprecedented number of donors, volume of
2 online contributions and dollars raised, they maintained a comprehensive system to review all
3 online contributions for compliance with the FECA. OFA Response in MURs 6078/6090/6108
4 at 2-4, OFA Responses in MURs 6139 & 6142 at 2-3, OVF Responses in MURs 6139 & 6142 at
5 2. The Committee asserts that its internal system of review surpassed the procedural
6 requirements for the collection and processing of contributions set forth in the Act, and that as
7 the volume of contributions increased, the Committee continually readjusted its procedures to
8 ensure that all contributions received on its own or through the Victory Fund complied with the
9 Act's requirements. OFA Response in MURs 6078/6090/6108 at 3-4; OFA Responses in MURs
10 6139 & 6142 at 2-3.

11 The consolidated OFA Response for MURs 6078, 6090 and 6108 includes an Affidavit
12 from the Committee Chief Operating Officer Henry DeSio, who describes the requirements in
13 the online contribution process that must have been met before the website would accept a
14 contribution:

- 15 • The Committee online contribution page informed each prospective donor of the
16 Act's source restrictions, in explicit language displayed in a conspicuous location
17 that the donor could not miss;
- 18 • No donor would make a contribution without first affirming that the funds were
19 lawful and consistent with the Act's requirements, by checking a box confirming
20 that the donor was a United States citizen or permanent resident, that the funds
21 were not from the treasury of a person or entity who was a federal contractor,
22 corporation, labor organization or national bank, and were not provided by any
23 person other than the donor;
- 24 • Donors who entered foreign addresses were required to check a box confirming
25 that they were either a United States citizen or a permanent resident alien, and
26 provide a valid U.S. passport number. *Id.* at 3-4; see also Affidavit of Henry
27 DeSio ("DeSio Aff.") ¶¶ 3-6.

1 The DeSio Affidavit goes on to describe the compliance and vetting process that occurred
2 after the online contributions were processed by a third party vendor and submitted to the
3 Committee:

- 4 • At regular intervals the Committee conducted automated searches of its donor
5 database, which included all contributions (whether raised online or through other
6 mechanisms), to identify any fraudulent or excessive donations;
- 7 • Contributions from repeat donors were examined to ensure that the total amount
8 received from a single donor did not exceed contribution limits; and
- 9 • As examples of questionable information, erroneous data or fraudulent
10 contributions were identified, the Committee's automated searches were refined
11 to query other contributions that might contain similar patterns of erroneous or
12 fraudulent data. *Id.* at 4.

13 2. The Victory Fund

14 The Obama Victory Fund is a joint fundraising committee established pursuant to
15
16 11 C.F.R. § 102.17, whose participants were Obama for America and the Democratic National
17 Committee ("DNC"). During the 2008 election cycle, the DNC, as a national party committee,
18 was limited to contributions from individual donors which in the aggregate did not exceed
19 \$28,500. 2 U.S.C. § 441a(a)(1)(B). Additionally, a joint fundraising committee established
20 pursuant to 11 C.F.R. § 102.17, may accept up to the limits of the participating committees,
21 which in this case would be \$33,100 per donor (the OFA limit of \$2,300 each for the primary
22 and general elections and the DNC limit of \$28,500). 11 C.F.R. § 102.17(a). The Victory Fund
23 filed its Statement of Organization on June 10, 2008 and received over \$198 million in
24 contributions during the 2007-2008 election cycle. The Victory Fund denies the allegations in
25 the complaints and contends that it maintained the appropriate procedures to ensure that
26 contributions received by the Committee and the Victory Fund were properly allocated and did
27 not exceed contribution limits. OVF Responses in MURs 6139 & 6142 at 2. Pursuant to 11
28

1 C.F.R. § 102.17, as a joint fundraising committee for OFA and the DNC, the Victory Fund may
2 accept up to \$33,100 per election from each individual contributor, rather than the \$2,300 per
3 election mistakenly cited in the complaint. *Id.* Moreover, the Victory Fund asserts that to ensure
4 that individual contributors did not exceed applicable limits to the Victory Fund or the
5 Committee, the Victory Fund verified all contributions it received with the donor records for the
6 Committee and the DNC. *Id.* If any contribution aggregated to exceed applicable limits to the
7 Committee, the excessive amount was first reallocated to the DNC; if after the DNC reallocation
8 the contributions still exceeded applicable limits, the excessive amount was refunded to the
9 contributor. *Id.*

10 **B. Excessive Contribution Allegation**

11 **1. Facts**

12 The complaints involve allegations based on Complainants' direct review of disclosure
13 reports filed by the Committee and the Victory Fund as well as information gleaned from online
14 media reports, and claim that Respondents accepted excessive contributions in addition to
15 knowingly receiving contributions from prohibited sources. Fling Complaint at 2; RNC
16 Complaint at 1-4; Kohtz Complaint at 1; Daniels Complaint at 1; Moore Complaint at 1.
17 Complainants list hundreds of individuals whom they claim made contributions exceeding
18 \$4,600 (which would be the aggregate total of the permissible amounts of \$2,300 each for the
19 primary and general elections) and contend that this is evidence that the Committee and the
20 Victory Fund contribution processes were utterly lacking in the appropriate internal controls to
21 ensure compliance with the FECA. Fling Complaint at 2; RNC Complaint at 1-4; Kohtz
22 Complaint at 1; Daniels Complaint at 1; Moore Complaint at 1.

1 Respondents reply that their comprehensive vetting and compliance system was designed
2 to identify all excessive contributions, including those specifically referenced in the complaints,
3 and redesignate, reattribute, or refund contributions, as appropriate. OFA Response in MURs
4 6078/6090/6108 at 5; OFA Responses in MURs 6139 & 6142 at 2; OVF Responses in MURs
5 6139 & 6142 at 3. Specifically, the Committee contends that only 112 of the 602 individuals
6 originally identified in complaints for MURs 6139 and 6142 made contributions that were
7 potentially excessive but later refunded; the rest, they assert, actually were compliant with the
8 Act. OFA Response in MUR 6139 at 3, OFA Response in MUR 6142 at 3. Respondents
9 provide attachment spreadsheets that list the individuals they assert were compliant, as well as
10 those who made potentially excessive contributions that were later refunded or otherwise cured
11 (some timely and some untimely).² OFA Response in MURs 6078/6090/6108 at 5; OFA
12 Response in MUR 6139, Exh. A; OFA Response in MUR 6142, Exh. A. Respondents argue that
13 their demonstration that most examples of excessive contributions cited in the initial complaints
14 were either compliant or rectified in a timely manner, is evidence that there is no need for an
15 investigation of their finances and reporting, and that these matters should be dismissed.

16 The Commission's Reports Analysis Division reviewed the Committee's disclosures for
17 the 2008 election cycle, which reflect that the Committee reported raising approximately
18 \$745,689,750 during that time period. A memorandum referring the Committee to the Audit
19 Division indicates that the Committee received over \$3.5 million in excessive contributions
20 during the 2007-2008 cycle that were not refunded, reattributed or redesignated

² The complaint in MUR 6142 has been supplemented 38 times, most recently on December 2, 2009, which lists thousands of transactions that are alleged to be questionable and/or represent excessive contributions. The Committee's Response to MURs 6139 and 6142 dated Dec. 29, 2008 addresses some of the transactions specifically identified in the supplements filed up to that date, but was not amended to address the supplemental complaints filed after that date, and offers the same general explanations provided in its response to MURs 6078/6090/6108.

³ See RAD Referral dated March 16, 2009. The apparent excessive contributions detailed in the RAD Referral are reflected in Chart A below. Because RAD's figures are based on its review of all of the Committee's original and amended disclosure reports, they will include any excessive contributions that were properly identified in the Complaints.

Chart A

Report	Excessive Contributions	Total Contributions Reported
Q1 07	\$103,382	\$25,702,886
Q2 07	\$116,241	\$32,889,836
Q3 07	\$47,280	\$20,652,528
YE 07	\$18,342	\$22,847,567
M2 08	\$35,151	\$36,188,803
M3 08	\$15,302	\$55,444,569
M4 08	\$44,825	\$41,161,694
M5 08	\$26,787	\$30,732,459
M6 08	\$22,287	\$21,953,056
M7 08	\$95,010	\$51,909,906
M8 08	\$359,966	\$50,337,860
M9 08	\$2,295,521 ⁴	\$65,090,662
M10 08	\$110,484	\$150,708,708
12G 08	\$27,823	\$35,944,586
30G 08	\$218,590	\$104,124,845
TOTAL	\$3,536,778 ⁴	\$746,889,750

³ the regulations provide 60 days from the date of receipt to refund excessive contributions without penalty, see 11 C.F.R. § 110.1(b),

⁴ The RAD Referral identified \$2,295,521 in potential excessive contributions based on the M9 Report, which included \$367,166 in excessive contributions from 317 individuals that were not refunded, redesignated or redistributed within 60 days of receipt, plus \$1,928,355 in contributions designated for the 2008 primary election that were reportedly received after the date of the candidate's nomination. A subsequent review of the Victory Fund's disclosure reports indicates that approximately \$1,646,236 of these primary-after-primary funds appear to have been received by the Victory Fund before the candidate accepted his party's nomination and the Committee reported the date the funds were transferred from the Victory Fund, rather than the date the funds were received by the Victory Fund on the contribution date. Therefore, the \$1,646,236 in contributions might not be excessive, but simply reported incorrectly by the Committee. An investigation will clarify whether the Committee properly reported the receipts in its M9 disclosure.

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8 RAD issued numerous RFAs to enable the Committee to explain or rectify its excessive
9 contributions. Though the Committee made significant efforts to identify, redesignate or refund
10 a significant number of the excessive contributions identified in the Commission's RFAs,
11 RAD's information indicates that the Committee failed to appropriately redesignate, reattribute
12 or refund \$1.89 to \$3.5 million in excessive contributions. Consequently, RAD referred the
13 Committee to the Audit Division, and the Commission approved an audit pursuant to its
14 authority under 2 U.S.C. § 438(b). The Section 438(b) audit notification letters were sent to the
15 Committee in April 2009, financial database information was obtained, and the Audit Division
16 has undertaken reconciliation of the Committee's records and disclosure reports. The 438(b)
17 audit team is currently conducting its field work.

18 2. Analysis

19
20 The FECA provides that no person shall make contributions to a candidate for federal
21 office or his authorized political committee, which (for the 2008 election cycle) in the aggregate
22 exceed \$2,300 each for the primary and general elections. 2 U.S.C. § 441a(a)(1)(A). For the
23 2008 election cycle, the Act also permits a national political party to receive from individuals or

³ Should the \$2,295,521 in excessive contributions identified by RAD be determined to include reporting errors, the excessive contributions for M9 may be reduced to \$649,284 and the Committee's total potential excessive contributions may be reduced to \$1,890,541.

1 persons other than a multicandidate committee up to \$28,500. 2 U.S.C. § 441a(a)(1)(B).
2 Additionally, a joint fundraising committee established pursuant to 11 C.F.R. § 102.17, may
3 accept up to \$33,100 (the combined per-candidate and per-political party contribution limits) for
4 each donor. 11 C.F.R. § 102.17(a) & (c)(5). The Act prohibits a candidate or political
5 committee from knowingly accepting contributions in violation of the contribution limits set
6 forth in the FECA, *see* 2 U.S.C. § 441a(f), and where a committee has received an excessive
7 contribution, it has sixty (60) days to identify and redesignate, reattribute or refund the excessive
8 amount. 11 C.F.R. § 110.1(b); *see also* discussion, *supra*, pp. 5-6.

9 **a. The Committee's Apparent Excessive Contributions**

10 Based upon the information available at this time, the Committee appears to have
11 accepted excessive contributions that range from \$1.89 million to \$3.5 million. In light of the
12 volume of total contributions raised, the Committee's overall compliance rate on the receipt of
13 contributions that comply with contribution limitations appears to be between 99.47 percent
14 (based upon the \$3.5 million figure) and 99.75 percent (based upon the \$1.89 million figure).
15 This information presents the Commission with the question of how to address a high number of
16 excessive contributions in the context of a high rate of compliance.

**MURs 6078/6090/6108/6139/6142/6214 (Obama for America)
First General Counsel's Report**

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9 On balance, we believe that the overall dollar amount in violation supports moving
10 forward to the next stage of the enforcement process.
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17 Accordingly, we recommend that the Commission find reason to believe that the
18 Committee violated 2 U.S.C. § 441a(f) by accepting contributions that exceeded contribution
19 limitations and authorize a Section 437g audit that would work closely with the Section 438(b)
20 audit to determine the amount in violation.

21 The Commission has already commenced a Section 438(b) audit, which has the purpose
22 of examining data provided by the Committee to "verify to the maximum extent possible"
23 whether the Committee is "materially complying with the Act and Regulations." See Authorized

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9 Because our Office would also plan to review the specific transactions alleged in the
10 complaints to be violations of the Act, which may not necessarily be included in the sample
11 reviewed through the Section 438(b) Audit Program, we recommend the Commission authorize
12 Section 437g audit authority to enable us to work coextensively with the Section 438(b) auditors.
13 We do not anticipate having a separate audit team, but believe that Section 437g audit authority
14 will allow us to participate in conferences with Respondents and the auditors, review information
15 provided by Respondents throughout the course of the audit (rather than waiting until after a
16 Interim Audit Report is circulated), and confer with the auditors to review data that may be
17 outside of the Audit Program processes, but necessary to complete our investigation. Approving
18 Section 437g audit authority at this stage will also provide notice to Respondents that
19 information they provide during the audit process and field visits will be used by both the
20 Enforcement and Audit divisions in their respective reviews of the Committee's potential FECA
21 violations, and grant the Committee the opportunity to respond to both inquiries at one time.⁶

⁶ If the Section 438(b) audit results in a referral for enforcement action while the investigation is ongoing, we would consolidate such a referral with these MURs.

b. The Victory Fund's Contributions

The Victory Fund denies allegations that any of its donors made excessive contributions. OVF Responses in MURs 6139 & 6142 at 2. The Victory Fund accurately notes that it is not subject to the \$2,300 per election contribution limit, as asserted in the complaint, rather it is subject to the \$33,100 contribution limit reserved for joint fundraising committees. *Id.* Moreover, the Victory Fund avers that it has procedures to ensure that its donors do not exceed applicable contribution limits, which include matching all contributions it received to the donor records of the Committee and the DNC. *Id.* The response states that any contributions the Victory Fund received that might have been excessive when aggregated with prior contributions to the Committee were either reallocated to the DNC or refunded to the contributor. *Id.*

Our Office has reviewed the information submitted in the complaints and responses in MURs 6139 and 6142 as well as the disclosure reports filed by the Victory Fund and determined that Complainants' allegations appear to rely on the mistaken belief that the Victory Fund is subject to the individual contribution limit of \$2,300 per election for candidates or candidate committees, as set forth in Section 441a(a)(1)(A). In fact, as a joint fundraising committee, the Victory Fund is subject to the \$33,100 per individual contribution limit set forth in 11 C.F.R. § 102.17. None of the individuals cited in the complaints exceeded this limit. Thus, the information Complainants submit as *prima facie* evidence that the Victory Fund violated Section 441a(f) is insufficient to support a reason to believe finding. Moreover, we have found no additional facts to support the claim that the Victory Fund accepted excessive contributions.

Finally, there is no support for Complainants' allegations that the Victory Fund violated the reporting requirements of 2 U.S.C. § 434(b) by misreporting disbursements to OFA, and failing to provide identifying information for contributors who gave less than \$200. The Victory

1 Fund responses and disclosure reports indicate that the transfers from the Victory Fund to the
2 Committee were made for ordinary disbursements of net proceeds pursuant to the joint
3 fundraising agreement between the Committee and DNC, and were reported correctly. 11 C.F.R.
4 § 102.17; *see* OVF Responses in MURs 6139 and 6142 at 3. Further, the Act does not require
5 committees to disclose the identification information of donors who contribute less than \$200 in
6 the aggregate during the election cycle. *See* 11 C.F.R. § 102.9.

7 Accordingly, we ~~recommend~~ that the Commission find no reason to believe that the
8 Obama Victory Fund and Andrew Tobias, in his official capacity as Treasurer, received
9 excessive contributions in violation of 2 U.S.C. §§ 441a(f) and 434(b).

10 **C. Possible Foreign National Contributions**

11 The FECA provides that it is unlawful for a foreign national, directly or indirectly, to
12 make a contribution or donation of money or other thing of value in connection with a Federal,
13 State, or local election, or to a committee of a political party and for a federal political committee
14 to receive or accept such a contribution. 2 U.S.C. § 441e(a)(1) and (a)(2); 11 C.F.R. § 110.20(b).

15 A "foreign national" is an individual, partnership, association, corporation or other entity
16 organized under the laws of or having its principal place of business in a foreign country.

17 2 U.S.C. § 441e(b). A "foreign national" does *not* include a person who is a citizen, national or
18 lawful permanent resident of the United States. *Id.*

19 Although the statute is silent as to any knowledge requirement, the Commission's
20 implementing regulations clarify that a Committee can only violate Section 441e with the
21 *knowing* solicitation, acceptance, or receipt of a contribution from a foreign national. 11 C.F.R.
22 § 110.20(g). The regulation contains three standards that satisfy the "knowing" requirement:
23 (1) actual knowledge; (2) reason to know; and (3) failure to conduct a reasonable inquiry. 11

1 C.F.R. § 110.20(a)(4)(i)-(iii). The reason-to-know standard is satisfied when a known fact
2 establishes "[s]ubstantial probability" or "considerable likelihood" that the donor is a foreign
3 national. See Explanation and Justification for Prohibition on Contributions, Donations,
4 Expenditures, Independent Expenditures and Disbursements by Foreign Nationals, 67 Fed. Reg.
5 69940, 69941 (quoting BLACK'S LAW DICTIONARY, 5th Ed. (1979)). The willful blindness
6 standard is satisfied when "a known fact should have prompted a reasonable inquiry, but did
7 not." See *id.* at 69940.⁷

8 1. Facts

9 Several of the complaints allege that the Committee violated 2 U.S.C. § 441e by
10 accepting contributions from foreign nationals. As support for these allegations, different
11 Complainants focus on the following facts: (1) approximately 10,400 contributors with foreign
12 addresses gave \$1.3 million to the Committee; (2) approximately 500 contributions from
13 contributors with foreign addresses were not made in whole dollar amounts (which Complainants
14 suggest means that the funds had been converted to U.S. dollars from a foreign currency); and
15 (3) various media outlets reported that foreign nationals may have contributed to the Committee.

16 Complainants argue that there are widespread problems with the Committee's
17 compliance systems, which warrant investigation into all of the Committee's contributions

⁷ Before the regulation was revised in 2002, Commissioners expressed concerns about the level of scienter required under Section 441e. For example, a Statement of Reasons ("SOR") issued in a Section 441e case decided shortly before revision of the regulation examined the statutory language and legislative history to conclude that despite the absence of precise language of a "knowledge requirement" in the statute, "it would be fundamentally unjust to assess liability on the part of a fundraiser or recipient committee that solicits or receives a contribution if the contribution in fact appears to be from a legal source, especially if initial screening efforts resulted in specific assurances of the contribution's legality." MURs 4530, 4531, 4547, 4642, 4909 (Statement of Reasons by Commissioner Thomas *In re Democratic National Committee, et al.*) at 3. Thus, coupled with the Explanation and Justification issued in November 2002, a knowledge requirement may be inferred based on similar provisions in the Act that specifically included such language despite the absence of any knowledge requirement in the statute. *Id.* at 2 (citing 2 U.S.C. §§ 441f, 441b(a)). See also 11 C.F.R. § 102.3(b)(i), which provides that contributions which did not appear to be from a prohibited source must be returned within a specified period from the date on which the Committee becomes aware of information indicating that the contribution is unlawful.

1 received from individuals with foreign addresses. Fling Complaint at 1; RNC Complaint at 1-2;
2 Kohtz Complaint at 1; Daniels Complaint at 1; Moore Complaint at 1. The Complainants who
3 rely merely on the Committee's receipt of contributions from individuals with foreign addresses
4 generally provide no additional facts to substantiate their claims these individuals are foreign
5 nationals, as opposed to eligible donors temporarily living abroad. One complaint points to a
6 newspaper report that asserts that the Committee received 37,265 contributions that were not in
7 whole dollar amounts, which the author concludes could be evidence that those contributions
8 were converted from foreign currencies to the U.S. dollar, and therefore came from foreign
9 nationals. MUR 6090 Complaint (citing Ex. K). Complainants offer no information to support
10 the conclusion that such funds were contributed in foreign currencies or that the individuals who
11 made contributions in foreign currencies were not lawful donors. Finally some of the complaints
12 cite media reports with anecdotal allegations of foreign nationals having contributed to the
13 Committee. Examples of these media reports include:

- 14 • A report about a group in Nigeria was reported to have sponsored an event, the
15 proceeds of which were purportedly going to be donated to the Committee, but
16 were seized by the government in a fraud investigation. MUR 6090 Complaint at
17 1-3 (citing Attach. A);
- 18 • Media coverage of a public statement made by Libyan leader Muammar al-
19 Gaddafi opining that foreign nationals supported candidate Obama and may have
20 contributed to the Committee. *Id.* (citing Attach. C);
- 21 • Reports about two brothers who owned a shop in the Gaza Strip and made bulk
22 purchases of Obama t-shirts to sell in their store. *Id.* (citing Attach. A, E, F);
- 23 • Article about an Australian man who admitted to knowingly using a fake U.S.
24 passport number in order to get the Committee's online contribution system to
25 accept his contribution. *Id.* (citing Ex. H); and
- 26 • Report about and a Canadian man who deliberately made false statements in order
27 to get the Committee's online contribution system to accept his contribution. *Id.*

- Allegations, which have been internally investigated and remain unsubstantiated, that an anonymous FEC analyst informed his supervisor that the Committee had accepted millions of prohibited contributions from foreign nationals and his warnings went unheeded. *Id.* (citing Attach. D);

The Committee maintains that its vetting procedures required online contributors to confirm citizenship or permanent resident status by checking a box. OFA Response in MURs 6078/6090/6108 at 4. Further, contributors with foreign addresses had to enter a valid U.S. passport number. *Id.* Finally, the Committee asserts that it maintained a system that at regular intervals surveyed all contributions received from foreign addresses, personally contacted contributors who were not known to be U.S. citizens or lawful permanent residents, and required the submission of valid U.S. passport information. *Id.* at 5.

2. Analysis

The allegation that Respondents knowingly accepted contributions from foreign nationals, and or failed to refund contributions after becoming aware of a basis for questioning whether the contributions were from a permissible source, is not supported by the available information. As discussed below, each of the three principal methods of proof relied upon in the complaints is flawed.

Complainants added up all contributions from donors with foreign addresses and alleged that all or significant numbers of those contributions must have come from foreign nationals because media reports had identified four foreign nationals who were alleged to have been contributors. RNC Complaint at 1. The Committee received approximately \$1,314,717 in contributions from 10,463 individuals with foreign addresses. The fact that these contributors listed foreign addresses is not, as Complainants claim, *prima facie* evidence that the contributors are foreign nationals or that their contributions should be suspect. 11 C.F.R. § 110.20(a)(4)(i). Although Complainants argue for a comprehensive review of all contributors with foreign

1 addresses, neither the media reports nor the complaints offer any specific information that would
2 suggest that any of the contributors with foreign addresses, other than the four specifically
3 identified in the media reports, are not American citizens living abroad, who are entitled to
4 contribute to federal political committees.

5 Similarly, the argument that the presence of contributions in odd (non-whole dollar)
6 amounts is *prima facie* evidence that a contribution might have come from an impermissible
7 foreign source is incorrect. First, there is a wide variety of explanations for a contribution to be
8 in non-whole dollar amounts, other than being a foreign currency. Second, even if the
9 contribution was made using a foreign currency, there is no legal presumption that the use of
10 foreign currency is sufficient to establish that a contributor is a foreign national. A U.S. citizen
11 living abroad, who is entitled to make contributions, might be expected to use a credit card
12 account or a bank account based on the currency of the country in which they temporarily reside.
13 Neither the complaints nor media reports provide any information that would serve as reasonable
14 cause to question the citizenship of a contributor based solely on the amount of a contribution.

15 While information that a contribution is received from a foreign address, foreign bank
16 and/or in a currency other than U.S. dollars might serve as pertinent information in examining
17 the contribution, the mere presence of such indicators does not establish reason to believe that
18 the Committee violated the prohibition against receiving contributions from foreign nationals.
19 Rather, a Committee need only make a "reasonable inquiry" to verify that the contribution is not
20 from a prohibited source to satisfy the Act's compliance regulations. 11 C.F.R. § 110.20(a)(7).
21 Here, there is evidence that the Committee made reasonable inquiries into the source of those
22 funds by: (1) informing website users of the appropriate legal requirements for making
23 contributions; (2) requiring contributors who used the website to proffer the appropriate

1 certifications before processing their contributions; and (3) maintaining an internal system to
2 review all contributions received from foreign addresses for compliance with the FECA and its
3 regulations. OFA Response in MURs 6078/6090/6108 at 4-5. There is also evidence that the
4 Committee's internal controls followed the Act's "safe harbor" guidelines by requiring donors
5 who attended fundraising events located outside of the United States or made contributions
6 online using foreign addresses to provide a valid U.S. passport number. *Id.*; see 11 C.F.R.
7 § 110.20(a)(7) ("[A] person shall be deemed to have conducted a reasonable inquiry if he or she
8 seeks and obtains copies of current and valid U.S. passport papers.").

9 **a. The Committee's Contributors**

10 In an effort to ascertain whether potential contributions from foreign nationals were being
11 identified by the Committee's compliance system, the Commission's Information Technology
12 Division generated a sample of 1,737 individuals with foreign addresses who contributed to OFA
13 during the primary and general election months of February 2008 and August 2008,
14 respectively.⁸ A review of the sample found eight contributors living abroad who gave the kind
15 of incomplete or questionable personal information that should have prompted the Committee to

⁸ The Commission has approved of the use of examining samples in order to ascertain whether excessive and prohibited contribution violations are substantial enough to warrant further inquiry. See, e.g., 11 C.F.R. §§ 9007.2(f)(1) and 9038.1(f)(1) (approving the use of sampling in the audit context to determine whether excessive and prohibited contributions are significant enough to warrant referral for enforcement). Here, we opted to review a sample of disclosure reports at the reason to believe stage in order to ascertain whether the violations of the Act alleged in the complaint are indicative of broader flaws in the Committee's compliance system and/or are significant enough to recommend that an investigation of the violations is warranted. We selected the months of February 2008 and August 2008 for the review because contributions reported by the Committee in these months represented median contribution receipts during the primary and general election period.

It should be noted that our review did not find evidence that the eight individuals were foreign nationals, but simply found that the address or employment information provided by these individuals was either incomplete or unverifiable, and additional information was necessary. These individuals were also flagged by the Committee and the notation "Information Requested" was included in the Committee's disclosure reports.

1 either conduct additional inquiry or reject of the donor's contribution. These eight individuals
2 donated a combined total of \$2,147 to the Committee.

3 Our Office then expanded the review to examine all of the contributions received by
4 individuals with foreign addresses during the entire election cycle. The broader review did not
5 identify additional individuals whose information suggested they might be foreign nationals or
6 require additional inquiry. The purpose of looking at the February/August sample as well as the
7 broader election cycle was to gain insight as to how the Committee's compliance system was
8 working, whether it was effectively identifying potentially prohibited contributions, and whether
9 corrective action was taking place to resolve questionable contributions.

10 Consistent with the assertions in the Committee's response, our review found that
11 contributors outside of the United States were required to affirm that they were United States
12 citizens. See OFA Response in MURs 6078/6090/6108 at 4-5. In fact, the website would not
13 accept contributions from individuals outside of the United States without certification that they
14 were citizens or legal permanent residents. *Id.* We found that contributors outside of the United
15 States were typically employed by the United States government or military, or working in the
16 international offices of American corporations, or for American non-profit, human rights or
17 religious organizations.

18 The contributions cited as examples of Section 441e violations in the complaints are
19 insufficient to support a reason to believe finding for the following reasons:

- 20 • There is no support for the inference that the Committee received contributions or
21 was in any way connected to the Nigerian fundraiser or its coordinators, as the
22 same media reports indicate that the Nigerian government seized the funds raised
23 and are investigating the matter as a fraudulent scheme. RNC Complaint, Exh. A.
- 24 • There is no information supporting the allegation that the general comments made
25 by Libyan leader Muammar al-Gaddafi claiming, "[People in the Arab and
26 Islamic world] welcomed [Barack Obama] and prayed for him and ... may even

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1 have been involved in legitimate contribution campaigns to enable him to win the
2 American presidency" are related to any identifiable contributions or fundraising
3 efforts for the Committee. *Id.*

4 • The allegations that contributions received by the Committee, which were not
5 made in whole dollar amounts must have been made in foreign currency and
6 therefore have originated from foreign sources, is also purely speculative, as the
7 conversion of monies from one currency to another is not evidence that the
8 individuals that were the source of the funds were foreign nationals. *Id.*

9 • The Australian man cited in the media report admits (in the same report) that he
10 knowingly made the illegal contribution through bypassing the online security
11 protocols by entering a false passport number and fraudulently certifying that he
12 was an American citizen living abroad, in order to get the website to accept his
13 contribution. RNC Complaint, Exh. H, OFA Response in MURs 6078/6090/6108
14 at 4.

15 • While the Canadian donor did not admit to making false statements, he also
16 denied remembering whether he certified that he was a citizen and stated that he
17 later contacted the Committee to request a refund. RNC Complaint, Exh. H. The
18 Committee asserts that the website did require a certification of citizenship to
19 make contributions from a foreign address and the contribution from the donor
20 has since been refunded. OFA Response in MURs 6078/6090/6108 at 4.

21 See OFA Response in MURs 6078/6090/6108, Exh. A.

22 According to media reports, brothers Hosam and Monir Edwan bought t-shirts from the
23 Committee's website to sell in their Gaza store, the proceeds of which constituted contributions
24 to OFA from the Edwans totaling \$6,945 and \$24,770, respectively.⁹ RNC Complaint, Exh. A.
25 The store report indicates that the Edwan brothers inserted the abbreviation "GA" in the address
26 line reserved for the name of the contributor's state of residence, which the Committee might
27 have mistaken to stand for "Georgia" rather than "Gaza." *Id.* The report also cites a campaign

⁹ It is well established that the proceeds from the purchase of fundraising items are considered to be campaign contributions. 11 C.F.R. § 100.53; see also AO 1975-15 (Wallace) (concluding that the full amount paid by a purchaser to a political committee or candidate for a fundraising item is a contribution); AO 1979-17 (RNC) (citing AO 1975-15) (The fact that the contributor received something of value in exchange for a political contribution does not change the character of the activity from a political contribution into a commercial sale/purchase transaction).

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1 official who states that until the media identified the Edwan brothers as being residents of Gaza,
2 the Committee had no reason to believe the Edwans lived outside of the United States. *Id.*

3 The Act provides that where a contribution does not present a genuine question of
4 whether it might be prohibited by the Act, but is later discovered to be illegal, a treasurer has
5 thirty (30) days from the date on which the illegality is discovered to refund the contribution.

6 11 C.F.R. § 103.3(b)(2). Here, the Edwan brothers made 28 t-shirt purchases, 22 of which were
7 refunded within 30 days of receipt.¹⁰ Refunds of the other six purchases (for \$4,130) were made
8 within two weeks of the first media report identifying the brothers as foreign nationals.

9 While we cannot be certain when the Committee discovered all of the contributors cited
10 in the media reports were foreign nationals, the Committee did refund all of the contributions
11 within 30 days of those reports or the information about the identity of those contributors
12 becoming public. Moreover, the fact that our review of the Committee's disclosure reports has
13 identified only \$2,147 in contributions from eight donors with foreign addresses that might be
14 questionable, with no additional information on whether they are in fact foreign nationals,
15 mitigates against finding reason to believe that the Committee violated 2 U.S.C. § 441e.

16 Because the potential Section 441e violations are limited in scope and amount (\$6,277)
17 and because there is insufficient information to suggest that the Committee acted unreasonably in
18 relying on the information provided by contributors affirming that they were United States
19 citizens, we conclude that opening an investigation into this issue would be an inefficient use of

¹⁰ Husam Edwan made seven contributions, all of which were refunded. Only the four smallest transactions (\$137, \$1,217, \$834 and \$508) were refunded outside the 30-day window. Monir Edwan made 21 contributions, all but two of which (for \$94 and \$1,290) were refunded within the 30-day window. *Id.* A total of \$4,130 of the contributions made by the Edwans was refunded outside the 30-day window, but within two weeks of the first media report.

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1 the Commission's limited resources." *See Heckler v. Chaney*, 470 U.S. 821 (1985); MUR 5950
2 (Hillary Clinton for President) (Factual and Legal Analysis dismissing Section 441e violation to
3 preserve resources where amount in potential prohibited contributions was minimal (\$1,000)
4 compared to total contributions received, and funds had been refunded before the complaint was
5 filed). Accordingly, we recommend that the Commission dismiss allegations that Obama for
6 America and Martin Nesbitt, in his official capacity as Treasurer, violated 2 U.S.C. § 441e by
7 accepting contributions from foreign nationals.

8 **b. The Victory Fund's Contributors**

9 Based on the information in the complaints, as well as our review of publicly available
10 information, there is no indication that the Victory Fund received even a single contribution from
11 an individual who has been demonstrated to be a foreign national. There are no examples
12 provided in the complaints or in the publicly available media or disclosure reports. Thus, there
13 appears to be no support for the claim that there are systematic breakdowns in OVF's monitoring
14 for contributions from foreign nationals.

15 We recommend that the Commission find no reason to believe that the Obama Victory
16 Fund and Andrew Tobias, in his official capacity as Treasurer, violated 2 U.S.C. § 441e by
17 accepting contributions from foreign nationals.

18 **D. Possible Contributions from Unknown Individuals**

19 The Act provides that no person shall make a contribution in the name of another person,
20 and no person shall knowingly accept a contribution made by one person in the name of another.
21 *See* 2 U.S.C. § 441f. A Committee has thirty days from the date that a prohibited contribution is

¹¹ While we do not anticipate it, should the Section 438(b) audit identify additional contributions that violate Section 441e and refer those violations for Enforcement action, the dismissal of the violations at issue here would not preclude the Commission from pursuing other Section 441e violations that might subsequently be referred by the Audit Division.

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1 made or discovered to have been made to refund the impermissible contribution. 11 C.F.R.
2 § 103.3(b)(2).

3 The complaints allege that individuals made contributions to the Committee using
4 fraudulent or fictitious names, and the Committee's online fundraising mechanism provided no
5 internal controls to circumvent the receipt of such prohibited contributions. RNC Suppl.
6 Complaint at 3-4. Different Complainants present two types of arguments for why the
7 Committee should have been on immediate notice that certain contributions did not come from
8 legitimate sources. First, some of the complaints contend that certain contributions were linked
9 to names that were clearly fictitious, and the fact that such contributions were processed by the
10 Committee's online fundraising system is evidence of widespread failure in its compliance
11 system and warrants investigation. Second, one of the later complaints (MUR 6214) points to a
12 range of anomalies in the patterns of the contributions attributed to particular individuals as
13 being sufficiently unusual and unlikely as to put the Committee on notice that these contributions
14 were illegitimate.

15 **1. Facts**

16 The complaints cite media reports identifying 11 individuals whose names were listed on
17 the Committee's disclosure reports as contributors, but later were determined to have submitted
18 fictitious or fraudulent names, addresses or credit card information. Examples of these
19 individuals include:

- 20 • Good Will – an individual who listed his name as "Good Will," his employer as
21 "Loving," occupation as "You" and who provided an address that turned out to be
22 for a Good Will Industries charity office in Austin, TX. Reportedly, no one by
23 the name of Good Will works at the office. Good Will made over 780
24 contributions in \$25 increments between March 2008 and April 2008, totaling
25 over \$19,500;

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- 1 • Doodad Pro – an individual who listed his name as “Doodad Pro,” his residence
2 as Nando, NY, occupation as “Loving,” and employer as “You” made over 850
3 contributions in \$25 increments between November 2007 and April 2008, totaling
4 over \$21,250;
- 5 • Persons with fictional addresses – some individuals provided questionable names
6 and fictitious addresses, including “Test Person” residing in Some Place, UT,
7 “Jockim Alberton” residing at a fictional address in Wilmington, DE, “Derty
8 West” and “Derty Potiury” both residing in rewg, ME and “fhdfhdfh” residing in
9 Erial, NJ; and
- 10 • Persons with obvious fictional names – some individual donors provided
11 nonsensical names including, “Hbkjb, jkbkj,” “Jgtj Jfggjfgj,” “Dahsudhu
12 Hdusahfd,” “Uadhshgu Hekadh,” “Edrty Eddity” and “Es Esh.”

13 During the course of its compliance process, and before the names were made public in
14 media reports or complaints, the Committee asserts that it had already identified many of these
15 same contributions as being of questionable legitimacy. Disclosure reports indicated that several
16 of the “contributions” made by fictitious donors cited in the complaints either were never
17 accepted due to invalid information (e.g., invalid credit card or banking information) or were
18 refunded immediately. In other instances, where contributions were accepted, refunds occurred
19 on a continuous basis. For instance, in the case of Doodad Pro and Good Will, who made
20 hundreds of contributions in small increments, refunds were done on a rolling basis before their
21 contributions appeared in media reports. Further, most of the refunds were completed to almost
22 all of these prohibited contributors within weeks of the first media reports and/or the initial
23 complaints filed with the Commission.

24 The Complaint in MUR 6214 makes an extensive and detailed analysis of various
25 patterns in the Committee’s receipts. This complaint alleges that the Committee failed to make
26 immediate use of an Address Verification System to confirm that each contributor’s reported
27 address information matched the address information for the credit card used to make the
28 contribution, which allowed the Committee to accept online contributions in transactions that

1 would have been rejected by other vendors accepting credit card payments over the internet.
2 This complaint suggests that the absence of this safeguard raises questions as to whether the
3 Committee adequately verified the true sources for online contributions it received via credit
4 card. In addition, this complaint identifies the following contribution patterns which it deemed
5 suspicious: 1) Non-Dollar Donations that were not in whole dollar amounts; 2) Non-Traditional
6 Donations that were in whole dollar amounts, but not in multiples of \$5; 3) Multiple Day
7 Donations where a donor has two or more donations on the same day; 4) Duplicate Donations
8 where the donors appeared to make two or more contributions of the same amount on the same
9 day. Complainant alleges that the Committee accepted an unusually large number of
10 contributions that fit into these patterns, which it deemed to be suspicious and merit further
11 review.

12 2. Analysis

13 As discussed above, the Commission has provided guidance to committees that they may
14 use Internet fundraising so long as committees use reasonable safeguards to enable them to
15 verify the identity of contributors and screen for impermissible contributions with the same level
16 of confidence that applies to other methods of fundraising, and act consistently with Commission
17 regulations. See AO 1999-09 (Bill Bradley for President, Inc.). Complainant's content that the
18 Committee's acceptance of online contributions from the unknown persons identified in the
19 complaints is clear evidence that it had no control mechanisms in place to catch third party fraud.
20 Fling Complaint at 1; RNC Complaint at 3-4; Kohitz Complaint at 1. Consequently, the
21 complaints argue, an investigation of all contributions is warranted. *Id.* RNC Suppl. Complaint
22 at 3-5.

1 Respondents assert that the compliance system the Committee maintains is designed to
2 identify individuals like those cited in the complaint and refund their contributions if they are
3 unlawful. OFA Response in MURs 6078/6090/6108 at 4. The Committee asserts that its
4 internal system runs regular searches of its donor database in order to identify information that
5 contributions may be fraudulent. *Id.* at 5. The Committee also asserts that through its vetting
6 and compliance system, as individuals who provided fictitious information are identified,
7 subsequent searches are modified to look for similar individuals or patterns of fraudulent donors
8 that were previously identified. *Id.* Regarding the individuals identified in the complaint,
9 Respondents provide information that most of the fraudulent contributions from these individuals
10 had been identified and refunded before the complaints were filed. *Id.*

11 a. The Committee

12 The complaint cites the names of eleven individuals with alleged fictitious names that
13 allegedly made contributions to the Committee. Only three of these individuals gave
14 contributions that were actually received and aggregated over \$1,000; they include:

- 15 • "Doodad Pro" made 850 contributions in \$25 increments totaling \$21,250,
- 16 • "Good Will" made 780 contributions in \$25 increments totaling \$19,500, and
- 17 • "Hbkjb, jkbkj" made a single contribution of \$1,077.23.

18 The "Doodad Pro" and "Good Will" contributions were refunded on a continuous basis either
19 before or within 30 days of the initial complaint in this matter, though many refunds were not
20 made within 30 days of the initial receipt of the contribution. The single "Hbkjb, jkbkj"
21 contribution was refunded within 30 days of receipt. Contributions from the remaining eight
22 donors cited in the complaint totaled approximately \$1,200; none of which has been refunded.

1 In order to ascertain whether there was a potential system breakdown that might have led
2 the Committee to accept large numbers of contributions from unknown persons, as alleged in the
3 complaints, the Commission's Information Technology Division generated a sampling of
4 contributions to the Committee in the primary and general election months of February 2008 and
5 August 2008, respectively. During the sample period, the Committee received a combined total
6 of \$73,976,663 in contributions from over 170,000 contributors. We reviewed the complaints,
7 disclosure reports and media reports for individuals whose information appeared to be
8 incomplete, fictitious or otherwise unverified as belonging to actual persons, and reviewed
9 whether suspect contributions were accepted, verified and, if appropriate, timely refunded by the
10 Committee.

11 In addition to the contributors cited in the complaints, we identified only six other
12 contributors to OFA whose names might have been fictitious based on the spelling or other
13 identifying information provided. These six contributors gave approximately \$17,445 to the
14 Committee, \$14,476 of which remains unrefunded. Thus, the recitations in the complaints and
15 the information provided by ITD for our review periods, identifies a total of 17 contributors with
16 potentially fictitious names who gave a total of \$68,472 in contributions to the Committee,
17 \$15,676 of which has yet to be refunded.

18 We believe dismissal of these allegations is appropriate because (1) the alleged
19 breakdown in the Committee's compliance system is not borne out by the available information
20 about the scope and amount of the contributions the Committee received from allegedly
21 unknown persons, and (2) the majority (approximately 75%) of the prohibited contributions
22 received from the fictitious individuals cited in the complaint and identified through our review

1 have been refunded.¹² In notifying the Committee of dismissal we would advise it of the
2 obligation to refund the prohibited contributions we have identified in our review.

3 For these reasons, it would not be an efficient use of the Commission's resources to open
4 an investigation into this issue with respect to the Committee. *See Heckler v. Chaney*, 470 U.S.
5 821 (1985); MUR 5950 (Hillary Clinton for President) (Factual and Legal Analysis dismissing
6 Section 441e violation to preserve resources where prohibited contributions were refunded
7 before the complaint was filed). Accordingly, we recommend the Commission dismiss
8 allegations that Obama for America and Martin Nesbitt, in his official capacity as Treasurer,
9 violated 2 U.S.C. § 441f by accepting contributions from unknown persons in the name of
10 another.

11 **b. The Victory Fund**

12 Regarding the Victory Fund, there are no indications that the Victory Fund received
13 contributions from the individuals specified in any of the complaints. Our review of the
14 February/August sample months identified a single contribution received from an unknown
15 person using the name "Anonymous, Anonymous" and totaling \$2,228. The Victory Fund's
16 compliance system identified the suspect contribution and flagged it for verification, but did not
17 refund it within the 30 days permitted by the Act.

18 Despite this apparent violation of Section 441f, dismissal of these allegations is
19 appropriate because (1) the prohibited contributions cited in the complaint are minimal when
20 compared to the total amount of contributions received by OVF (\$2,228 out of \$93 million), and
21 (2) allegations of breakdowns in the compliance system set forth in the complaints are not borne

¹² While we do not anticipate it, should the Section 438(b) audit uncover any information that suggests that the Committee committed more violations of 2 U.S.C. § 441f, and refers the violations for Enforcement action, the Commission would not be precluded from taking Enforcement action for those violations.

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1 out by the Commission's review of the contributions received by the Victory Fund. Thus, it
2 would not be an efficient use of the Commission's resources to open an investigation into this
3 issue with respect to the Committee. *See Heckler v. Chaney*, 470 U.S. 821 (1985); MUR 5950
4 (Hillary Clinton for President) (Factual and Legal Analysis dismissing Section 441e violation to
5 preserve resources where prohibited contributions were refunded before the complaint was filed).

6 Accordingly, we recommend that the Commission dismiss allegations that the Obama
7 Victory Fund and Andrew Tobias, in his official capacity as Treasurer, violated 2 U.S.C. § 441f
8 by accepting contributions from unknown persons in the name of another.

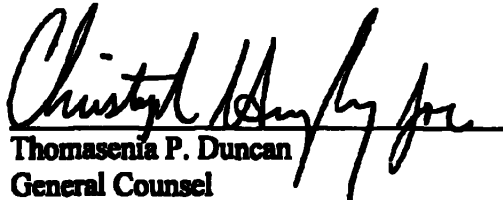
9 **III. RECOMMENDATIONS**

- 10 1. Find reason to believe Obama for America and Martin Nesbitt, in his official capacity
11 as Treasurer, accepted excessive contributions in violation of 2 U.S.C. § 441a(f);
- 12 2. Authorize an audit of Obama for America and Martin Nesbitt, in his official capacity
13 as Treasurer, pursuant to 2 U.S.C. § 437g;
- 14 3. Dismiss allegations that Obama for America and Martin Nesbitt, in his official
15 capacity as Treasurer, violated 2 U.S.C. § 441e by accepting contributions from
16 foreign nationals;
- 17 4. Dismiss allegations that Obama for America and Martin Nesbitt, in his official
18 capacity as Treasurer, violated 2 U.S.C. § 441f by accepting contributions from
19 unknown persons in the name of another;
- 20 5. Find no reason to believe Obama Victory Fund and Andrew Tobias, in his official
21 capacity as Treasurer, accepted excessive contributions in violation of 2 U.S.C.
22 § 441a(f);
- 23 6. Find no reason to believe Obama Victory Fund and Andrew Tobias, in his official
24 capacity as Treasurer, violated 2 U.S.C. § 441e by accepting contributions from
25 foreign nationals;
- 26 7. Find no reason to believe Obama Victory Fund and Andrew Tobias, in his official
27 capacity as Treasurer, violated 2 U.S.C. § 434(b) by misreporting disbursements;
- 28 8. Dismiss allegations that Obama Victory Fund and Andrew Tobias, in his official
29 capacity as Treasurer, violated 2 U.S.C. § 441f by accepting contributions from
30 unknown persons in the name of another;

9. Approve the attached Factual and Legal Analyses; and

10. Approve the appropriate letters.


3/30/10
Date


Thomasenia P. Duncan
General Counsel


Ann Marie Terzaken
Associate General Counsel for Enforcement


Mark Shonkwiler
Assistant General Counsel


Camilla Jackson Jones
Attorney


Phillip Olvera
Attorney